(1)

No. 94-23

In The

Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF CITY OF FULTONDALE, ALABAMA, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The City of Fultondale, Alabama, as *amicus curiae*, is a political subdivision of the State of Alabama, and submits this brief in support of the City of Edmonds, petitioner. Counsel for *amicus curiae* are authorized law officers of the City, and consent to this submission is not necessary. Rules of the Supreme Court of the United States 37.5.

The City of Fultondale (Fultondale) is presently engaged in litigation concerning its Zoning Ordinance enacted September 8, 1986, which in the definition of

family adopted basically the one approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

> One person or a group of two or more persons living together and inter-related by bonds of consanguinity, marriage, or legal adoption, occupying the whole or part of a dwelling as a separate housekeeping unit with a common and single set of culinary facilities. The persons thus constituting a family may also include two (2) additional guests who occupy rooms for which compensation may not be paid. Any group of persons not so related, but inhabiting a single housekeeping unit, shall be considered to constitute one family for each five persons, including domestic employees, contained in each group.

Fultondale further established a category acknowledging the existence of facilities operated by commercial or non-profit entities which provide care of persons with disabilities or the infirmities of old age. This category, based upon the realities of the situation, was labelled "domiciliary care facilities":

> Homes for the aged, intermediate institutions, and related institutions, whose primary purpose is to furnish room, board, laundry, personal care, and other non-medical services, regardless of what it may be named or called, for not less than twenty-four (24) hours in any week, to individuals not related by blood or marriage to the owner and/or administrator. This kind of care implies sheltered protection and a supervised environment for persons, who because of age or disabilities, are incapable of living independently in their own house or a commercial board and room institution, yet who do not require the medical and nursing services provided in a nursing home. In these facilities, there might be available temporary and incidentally the same type of limited medical attention as an individual would receive if he were living in his own home.

These domiciliary care facilities cannot be operated in the single family areas established of R-1 and R-2. However, they are permitted in the R-3 multiple family district, together with single family dwellings, and two-family dwellings, along with other uses.

In December of 1993, the ASSOCIATION FOR RETARDED CITIZENS OF ALABAMA, INC., of Jefferson County, placed three mentally retarded clients in a house located in an R-2 district. This private non-profit corporation (ARC) is engaged in the business of providing handicapped persons who are mentally retarded with housing facilities and services.

In his answers to interrogatories, the executive director of ARC stated that each of the clients had an IQ of less than 20, which is a profound level of mental retardation, or profound and severe. These clients are provided care by persons who come to work in shifts, and provide round the clock care including training in "personal hygiene, daily living, and social and recreation to the fullest ability of clients." There are eight (8) full and part time technicians, with around six (6) staff personnel who spend various hours in and about the premises. None of the clients is employed. Funds are supplied through Medicaid and state funding appropriations. Clients receive SSI, SSA, or VA benefits which are paid to ARC for room and board. Further funds are received by ARC through

United Way. ARC operates four 10 bed and ten 3 bed facilities. Taxpayer funds received are very substantial, according to answers of ARC.

The occupants in the *Edmonds* situation are apparently capable of independent living and voluntarily live together and operate the house. The occupants in the Fultondale house are not capable of independent living, according to the medical authorities. In Tomb, *Psychiatry* (4th Ed., Williams & Wilkins, Balto., Md., 1992), p. 169, the following appears:

> *"PROFOUND MENTAL RETARDATION* (SM-111-R p. 33, 318.20) – IQ below 20. One percent of all retarded. *They are totally dependent upon others for survival."* (Emphasis supplied).

See also, Sue, *Understanding Abnormal Behavior* (3rd Ed., Houghton Mifflin Company, Boston, 1990), at pp. 479, *et seq.*, to the same effect at p. 486:

> "**Profound (IQ 0 to 19)** Only about 1 to 2 percent of people with mental retardation are *profoundly retarded;* these people are so intellectually deficient that constant and total care and supervision are necessary. * * * *"*

To protect the integrity of the R-2 district in which the ARC operation was located, Fultondale, joined by two citizens who had resided in their home in the district since 1976, filed an action in the Circuit Court of Jefferson County, Alabama, No. CV94-1508, on February 28, 1994, styled *Thrasher, et al. v. Housing Agency for Retarded Citizens, II, et al,* for a declaratory judgment to determine the respective rights of the parties. The thrust of the position of the City was that in none of the zoning provisions set forth above was "there any language which does, or can

be interpreted to, place mentally retarded or other handicapped persons at any disadvantage whatsoever as compared to the remainder of the populace who wish to occupy premises for like reasons."

ARC answered by relying upon the Fair Housing Amendments Act, 42 U.S.C. §§3601-3619, especially a failure to make reasonable accommodations to permit the operation of the care center, citing 42 U.S.C. §3604(f)(3)(B).

ARC also filed its declaratory judgment counterclaim predicated upon the same section. A claim of intentional discrimination was asserted too. There was a demand to redefine "family".

Fultondale moved for a summary judgment on September 26, 1994, which was heard on October 14, 1994. An order entered on October 18, 1994, granted summary judgment to Fultondale based upon the "domiciliary care facility" use, as above, and which the Court held to be a valid and enforceable zoning ordinance in prohibiting such a use in an R-1 or R-2 area. Relief on the counterclaim was denied.

This summary judgment has been appealed by ARC to the Supreme Court of Alabama on November 21, 1994.

Fultondale, as with many cities, is a small community with limited resources and is faced, if the ruling of the Ninth Circuit is upheld, with the proliferation of placements by private entities, basically commercial though denominated "non-profit". Fultondale, as with other

cities, has been threatened with sanctions and large attorney fees if any placement be questioned. Fultondale finds its legally legislated zoning ordinance being destroyed!

SUMMARY OF ARGUMENT

The court below *held* that the zoning ordinance of Edmonds was invalid because there was no "reasonable accommodation" made to include a house with 10 occupants, and the exemption in 42 U.S.C. §3607(b)(1) was not applicable.

Fultondale, as *amicus curiae*, argues a court cannot force a political subdivision of a State to adopt any provision of the Fair Housing Amendments Act of 1988 and there has been no preemption of the local zoning ordinances. Thus, it could not use "reasonable accommodation" provision of the Act to hold a zoning ordinance invalid. The proper test of validity then would be that equal protection analysis in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The court has also approved a class with superior rights without due process in reaching the approval.

Fultondale then argues that the "reasonable accommodation" provision does not apply to legality of zoning laws if a proper interpretation of the Act is made, with particular reference being made to the interpretation by the Department of Housing and Urban Development.

Finally, Fultondale argues that the Act is so broad in defining "handicapped persons" that a cap on unrelated

persons must be retained as a tool in effective zoning, which remains a local problem basically.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, U.S. CONSTITUTION, AS APPLIED IN *VILLAGE OF BELLE TERRE v. BORAAS*, 416 U.S. 1 (1974), IS CONTROLLING AND THE EDMONDS ZONING ORDINANCE IS VALID WITHOUT REGARD TO 42 U.S.C. §3607(b)(1) EXEMPTION

The case at bar, and the Fultondale one, involve legally enacted legislation by a State or one of its political subdivisions. The field of zoning in the States is not preempted, and indeed it most probably could not be constitutionally preempted. *New York v. United States, et al.*, Supreme Court, Nos. 91-543, 91-558, 90-563 (1992). Only a zoning ordinance which "purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. §3615.

The Attorney General of the United States is authorized to bring an action to declare a zoning ordinance invalid. 42 U.S.C. §§3610(g)(2)(C) and 3614.

However, there can be no requirement that the States, or the political subdivisions, enact zoning legislation to carry into force the provisions of these FHA amendments. See *New York v. United States, supra*.

The United States Court of Appeals for the Ninth Circuit, it is submitted, erred constitutionally when it stated, at 18 F3rd, pp. 806-807 thusly:

> " * * * the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance. The legislative history and purposes of the FHAA demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped persons. This can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances. Edmonds must satisfy the FHAA standards. * * * "

This conclusion places the sign of approval upon the creation by the Congress of a superior right in one with a disability which is not enjoyed by any other person, including the person who has purchased a house in a residential area zoned for single families relying upon that zoning, and which zoning has not been changed by the state mandated procedures, including the opportunity for a hearing.

The Ninth Circuit Court ignores the rights of homeowners, which was considered in *Belle Terre, supra,* and has destroyed these rights without any semblance of that due process guaranteed by the Fifth Amendment, United States Constitution, which should be followed by federal courts above all!

Thus, if the Ninth Circuit does not apply the statutory exemption, then, it is submitted, the question

devolves to the equal protection analysis in *Belle Terre, supra,* which should be followed, and not overruled.

II.

42 U.S.C. §3604(f)(3)(B), CONCERNING "A REFUSAL TO MAKE REASONABLE ACCOMMODATION IN RULES, POLICIES, PRACTICES AND SERVICES, ETC." IS IMPROPERLY INTERPRETED TO APPLY TO ZONING ORDINANCES.

The Fair Housing Amendments Act of 1988, 42 U.S.C. 3601-3619, is extremely broad legislation, but can be divided into two sections. The first treats discriminatory acts subject to administration by the Secretary of Housing and Urban Development. The second is about zoning laws. Thus, complaints of discrimination made to the Secretary which are determined to involve the legality of any State or local zoning or other land use law or ordinance shall be immediately referred to the Attorney General of the United States. See 42 U.S.C. §3610(g)(2)(C).

42 U.S.C. §3604, in which the reasonable accommodation language appears, is labelled to be primarily one about discrimination in sale or rental of housing, and a close reading sustains the correctness of the labelling. This conclusion is supported by a reading of the executive branch interpretation which appears at 24 CFR (rev. 1994), §100.204, p. 788, and revolves around discriminatory actions such as parking places and seeing-eye dogs.

A reading of the latest available *The State of Fair Housing, 1991,* the report of the Department of Housing

and Urban Development, reveals that HUD did use conciliation in a zoning variance complaint to obtain the variance, which is not a complaint involving the legality of the zoning law. Forty-five of these latter complaints were referred to the Department of Justice.

Nowhere does there appear any evidence that HUD or the Department of Justice believes it has the power to *force* the change of a zoning ordinance claimed to be discriminatory, so that a refusal to make a "reasonable accommodation" could be termed a discriminatory act.

This conclusion is on sound grounds, since in *Village of Belle Terre v. Boraas, supra,* this Court confirmed the idea in *NAACP v. Button,* 371 U.S. 415 (1962) of a right to vigorous advocacy and also the right of access to the courts, which must include the right to litigate to a decision and not to compromise, and this without penalty.

III.

THE CONSIDERATION OF THIS CASE MUST RECOGNIZE THE COUNTLESS FACTUAL SITUATIONS WHICH CONTINUE TO ARISE UNDER THE APPLICABLE LEGISLATION, ESPECIALLY THOSE CASES INVOLVING THE MENTALLY RETARDED

The question as posed before the Court posits application of the Fair Housing Amendments Act to persons protected by the Act.

All "handicapped persons" are not the same.

In *Edmonds* the handicapped are "recovering adult alcoholics and drug addicts". The house occupied is self-

supporting and democratically governed. In this Fultondale case, the clients in the residence are profoundly mentally retarded and must have constant and total care and supervision, and there could be at least ten (10) in a group home such as operated by ARC elsewhere.

This difference is discussed in *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 442-443 (1985):

> " * * * First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-formed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."

This sound advice from this Court was ignored completely in the legislation under consideration.

"Handicap" is defined in 42 U.S.C. §3602(h)(1) as follows:

" 'Handicap' means, with respect to a person –

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities. * * * "

24 CFR (rev. 1994), §100.201, p. 775, *et seq.*, in (a) (p. 776) states a *mental impairment* includes "(2) Any mental or psychological disorder, such as *mental retardation*, * * * " (Emphasis supplied.)

Further, (2) continues: "The term *physical or mental impairment* includes * * * mental retardation".

NO FURTHER DEFINITION OF *MENTAL RETARDATION* HAS BEEN LOCATED IN THIS STATUTE OR ANY OF THE REGULATIONS.

A cap on unrelated persons must be retained as a tool of effective zoning since outfits such as ARC are persistent in claiming the mentally retarded residing in a house even though totally dependent do, in fact, constitute a "family" and the house a "dwelling". 42 U.S.C. 3602(b). If indeed this be sanctioned then facilities such as nursing homes, domiciliary care facilities, etc., are covered by the legislation here involved, and local control of zoning is lost.

The disabled in the areas just mentioned are protected by the doctrine of *Cleburne, supra.*

CONCLUSION

Fultondale submits the cap on unrelated persons residing in a single family district should be retained either because of the exemption in 42 U.S.C. §3607(b)(1), or to follow the doctrine of *Village of Belle Terre, supra.*

Further, because of contentions that certain disabled persons living together in circumstances akin to a nursing home or total care commercial establishment are claiming to be a "family" the cap is necessary for reasons enunciated in *Cleburne, supra.*

Respectfully submitted,

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